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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 772

JOSEPH T. MARZEC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming petitioner's conviction under Section 145(b) of the Internal Revenue Code of 1939.

OPINION BELOW.

The opinion of the Court of Appeals is not yet officially reported and is printed herein, Appendix A, *infra,* pp. 33-39.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 13, 1957. The time for filing this petition was

extended to and including February 10, 1958, by an order of Mr. Justice Clark dated January 3, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. Whether petitioner, as an accomplice, acquired an equitable right to immunity from prosecution by supplying evidence to the Government and testimony as a witness for the Government against his confederates of equal or greater guilt.

2. Whether the enactment of the Federal Probation Act abolished the equitable rights of an accomplice—as defined by this Court in *The Whiskey Cases,* 99 U. S. 594.

3. Whether it is consistent with the basic concepts of fair play, our canons of decency and fairness, and due process, that such an accomplice, after having been denied such rights and then convicted by a jury, should receive a sentence far more severe than that imposed upon any of said confederates who pled guilty—even though they could not have been prosecuted or convicted if it had not been for his cooperation and testimony.

4. Whether petitioner was deprived of the assistance of counsel by being forced to trial with counsel who was unprepared.

5. Whether petitioner was accorded a fair trial.

6. Whether the facts of this case establish a flagrant denial of due process from the time of its investigation up to and including its disposition by the trial court.

7. Whether the court below properly and adequately disposed of this case.

STATUTE INVOLVED.

Internal Revenue Code of 1939, Section 145(b); 53 Stat. 62 (1939), 26 U. S. C. 145(b) (1952 Ed.).

* * * * *

(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT.

THE PROCEEDINGS.

This case was commenced on December 15, 1955, by the return of an indictment against Frank A. Brandt, Stanley T. Kusper, Bruno J. Sobieraj, and the petitioner, Joseph T. Marzec. Each defendant was charged with attempting to evade and defeat his individual income taxes for the years 1949 and 1950 by the filing of false and fraudulent income tax returns for said years. Counts one and two related to Brandt; counts three and four to Kusper; counts five and six to Sobieraj; and counts seven and eight to Marzec (A. 1). Motions for severance and for separate trials were filed by each defendant and were denied by the trial court (A. 13).[1]

On January 18, 1957, Sobieraj withdrew his plea of not guilty as to count five, and entered a plea of guilty to said count, and count six of said indictment was dismissed (A. 2). On February 21, 1957, he was sentenced to one year's imprisonment, which sentence was suspended and he was placed on probation (A. 302).

On January 29, 1957, Brandt withdrew his plea of not guilty as to count one, and entered a plea of guilty

1. In the proceeding below, petitioner filed an Appendix designated "Appendix to Defendant-Appellant's Brief," the Government filed an additional Appendix designated "Appellee's Appendix".

These two appendices have been certified to this Court in accordance with Rule 21(3). Page references to petitioner's appendix below will be made in the following manner: (A. ....). Page references to the Government's appendix below will be designated (G. A. ....). The proceedings of February 21, 1957, when Brandt, Sobieraj, and Marzec were sentenced, was not printed in either appendix but were part of the record in the court below. A certified copy of such proceedings has been procured and lodged with the Clerk of this Court.

to said count, and count two of said indictment was dismissed. On February 21, 1957, he was sentenced to one year's imprisonment (A. 301).

On February 18, 1957, on motion of the Government, the indictment was dismissed as to the defendant Kusper for lack of sufficient evidence (A. 297-8).

After a jury trial, petitioner was found guilty and on February 21, 1957 was sentenced to three years' imprisonment on each count, the sentences to run concurrently, and was denied probation (A. 305, 306).

THE OPINION OF THE COURT BELOW.

The opinion of the court below is so lacking in factual matter and legal analysis that it fails to give an accurate picture of what this case is about. It loses sight of the substantial questions involved and their impact upon the proper administration of justice in Federal Courts.[2]

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2. The situation here would seem incredible. Among other things, our law enforcement officers first availed themselves of Marzec, the employee, to bring his three superiors to the bar of justice for the evasion of their taxes. They then abandoned Marzec and used his prosecution to benefit these other three in their tax difficulties, poisoning and polluting the waters of justice, making a mockery of our administrative and judicial processes, and reflecting upon the integrity of their own Government.

Once they abandoned petitioner, they took every conceivable unfair advantage of him and his counsel, though the doing of justice must be "made so manifest that only irrational or perverse claims of its disregard can be asserted", *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124.

There is much analogy between the facts and issues recently considered by this Court in the case of *United States* v. *Shotwell Manufacturing Company*, ... U. S. ...., and the more varied, novel, and serious ones here. The Government there sought the required relief. Since justice is not a one way street, petitioner here seeks relief, it having been denied in the court below.

Situations such as these, which were approved by the court below, strike at the very foundation of our System of Jurisprudence, thus commanding themselves to the broad supervisory authority of this Court. As this Court has emphasized, they are not to be treated lightly, as the court below would have us believe,

Influenced by its conclusions that counsel for the defendant, Joseph A. Struett, informed it, the trial court and the jury, that his client "was guilty" and that the "defendant's evidence alone proved that he was guilty," the court below obviously concluded that all of petitioners' contentions were specious and that they required no factual, and little, if any, legal consideration. The facts recited by the court below are so incomplete and inaccurate that when implemented by other pertinent facts they not only fail to support the court's conclusions, but establish just the contrary.[3]

Most of petitioner's contentions and particularly those involving "the integrity of a criminal trial in the federal courts"; the integrity of our administrative and judicial processes and due process were all "resolved", by conclusions of the court below that they were without foundation, had no record support, and/or that the record establishes just the contrary. Such consideration, treatment, and disposition of contentions of this character were wholly inadequate and improper. *United States* v.

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but are to be resolved only after most careful, cautious, and full factual and legal analysis. As this analysis is made, due consideration will be given to the varied contentions of the Government and the conclusions of the court below. Such matters will be then and there resolved, to avoid repetitious argument later. In undertaking this task, due deference will be given to Rule 23 § 1a and 4 of this Court.

3. To illustrate; the court below questions the sincerity of Marzec and denies him the right to immunity because he did "absolutely nothing" to protect it during the long pendency of this case prior to the agreed trial date. No mention is made in its opinion (1) that the Government admittedly had full knowledge of this asserted right during the long pendency of this case; (2) that it first came forward, questioned and denied Marzec's right on January 23, 1957; (3) that this occurred just twelve days before the set joint trial date of February 4, 1957 for all four defendants—in fact the joint trial date of the other three since Marzec was a required witness against them; (4) that the Government then had no further use for Marzec or his trial testimony; and (5) that six days thereafter, on January 29, 1957, Marzec took adequate steps to protect said right.

Shotwell Manufacturing Company, ... U. S. .... , decided December 16, 1957 and referred to herein as the *Shotwell* case.

The Government and the trial court apparently proceeded on the theory that since petitioner had admitted his "guilt" he was duty bound to plead guilty, and, when he did not, they could deal with him as they desired and could justify their acts by the course of conduct petitioner and his counsel pursued. The court below approved their acts on much the same theory. The fact that petitioner's counsel forthrightly informed all of them of the true facts and that petitioner at his trial testified truthfully, not sparing himself, was to his credit and merits comparison with the tactics of the Government. These facts did not furnish excuse for or justification of the action of the trial court, and in turn the court below, in denying to petitioner the basic rights of every defendant in a criminal case.

Petitioner's "equitable title to mercy" was founded upon his full and fair disclosure of all the facts. He asserted that right and sought to protect it before the trial date by a motion to continue his trial. When that motion was denied, the only way to protect it was to stand trial and appeal, if convicted. *Roche* v. *Evaporated Milk Ass'n.*, 319 U. S. 21. Petitioner did not first inform, disclose, and admit to the Government; then, when turned upon, claim his "innocence" and deny his "guilt". The Government first said that petitioner was a mere employee and collector (G. A. 60). Then, when it turned on him, it said that it honestly did not know who was the dominant party, Marzec, or Brandt the Treasurer (Proceedings at time of sentence).

Petitioner, and even those guilty of the most heinous of offenses, are not to be denied due process; nor put to trial if equity and law require otherwise. They have a con-

stitutional right to have a jury determine their guilt or innocence; and to be represented by prepared and effective counsel at their trial. Moreover, they are to be accorded a fair trial by an impartial judge and are not to be convicted on a "corrupt record." If convicted, they are not to be given a sentence of such severity that it, together with other circumstances, might give "fair support" to the charge that they had been denied any of these rights or were being punished for having availed themselves of their right to a trial by jury. It is the duty of our law enforcement officers and our courts to make certain that all such persons have received and that they do receive "Equal Justice Under Law," the minimum requirements of due process.

IMMUNITY.

Petitioner Marzec was a clerical employee of a fraternal union making loans on real estate through brokers. He also was the collector of "kick-back" commissions, usually four percent of the face value of the loan, which these brokers were required to pay before their loans would be approved. These commissions were usually paid to him in cash, cashier's checks, or checks to cash, and are referred to herein as "cash commissions." Marzec, in turn, after retaining his one-fourth share, distributed the balance secretly and equally to Brandt, the Treasurer of said union, Sobieraj, the "independent appraiser" of the property securing said loans, and Kusper, the General Counsel of said union, who had the responsibility for the making and approving of said loans (G. A. 60-61). None of these persons reported the receipt of such commissions in their individual income tax returns. This was the joint venture charged in the indictment referred to in the opinion of the court below. The unreported income charged against each

defendant was only his *respective distributive share* of said cash commissions.[4]

The investigating agents sought to and did charge against Marzec all criminal and civil income tax liability for all said commissions so collected, recommended only his prosecution, and obtained from the other defendants affidavits to the effect that they had not shared in said cash commissions. This action and results may have been but a part and parcel of a criminal conspiracy to obstruct justice, to frame Marzec, and to exculpate these other three, with a twelve-flat building as the pay-off. A statement of this character should be, as any conspiracy must be, substantiated by overall facts supported by many detailed facts. Such facts appear in Appendix B, *infra* pp. 39-56.[5]

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4. This overall picture appears, from the Government's answer to the motion of all defendants for a severance (A. 8, Petitioner's Appendix 8); its answer to the motions of other defendants for bills of particulars (G. A. 74-77); the arguments of the Government relative thereto (G. A. 60, 68); and the trial testimony of Government witnesses and of Marzec.

There were some variations of the above picture. When checks were received by Marzec, he gave Sobieraj and Kusper their share by checks payable to them *or* in the case of Sobieraj sometimes payable to a partnership he had with his mother in law; and in the case of Kusper mostly payable to B. Repsuk (Kusper spelled backwards; Blanche was his wife's first name). Such payments were reported by Marzec, Sobieraj and Kusper, and were not involved in the charges of the indictment.

Brandt always received as his share one percent, or one point, and always in cash. The charges in the indictment against Brandt covered all the commissions received by him since he had not reported any of them. As to Kusper, Sobieraj, and Marzec, it covered only those commissions which were paid in cash since, as shown above, they had reported the payments received by check.

If Marzec received five percent (these were mostly check payments), he kept two percent and distributed the other three percent among the other three. If he received three percent, or three points. Brandt received his one percent and the other two percent was divided among the other three. Kusper received a little less than his usual share on the loans made by two brokers.

5. As a part of said conspiracy, petitioner was induced to deny to the investigating agents the receipt of these cash commis-

Petitioner discovered the above in September of 1953, when his case was in the United States Attorney's office for indictment. With benefit of new counsel, Mr. Rieger and Mr. Struett, he shortly thereafter advised the United States Attorney and representatives of the Bureau that there were others of far greater guilt involved, whose prosecution might well have been stifled, and offered under proper circumstances tc admit his own culpability, fully disclose, and furnish required information, cooperation, and testimony against these others.

Representatives of the Bureau—though they no longer had jurisdiction of his case—opposed Marzec's offer. They consistently asserted that they would not consent to the granting of immunity to Marzec; that they had obtained affidavits from these other three that they had not shared in these cash commissions; and that they would not investigate further.[6] The Government, however, availed itself of Marzec's offered cooperation and testimony early in 1955 (A. 215-216), and thereafter, which resulted in the return of the indictment in question. Marzec was always ready and willing to testify against the others at their trial.[7]

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sions by the other defendants and his selected representatives on their false assurances that they would settle this case and pay the bill. He did so deny their receipt. The Government, to establish wilfullness, offered evidence of such denial (G. A. 265). It was petitioner's position before the trial court and the court below that to refute such evidence of wilfullness he had a right to fully develop and introduce in evidence the existence of this alleged conspiracy and that once he was freed from same, he fully admitted, disclosed, and cooperated with the Government. This the trial court refused to permit him to do (G. A. 380).

6. All of such opposition, relied upon in part by the court below to reject Marzec's asserted right to immunity, might well have been but further steps in this conspiracy since, without Marzec and his testimony, the prosecution of the others would have remained stifled.

7. These facts were fully stated in petitioner's motion, filed January 29, 1957, to vacate the order of the trial judge entered on

It is admitted fact that without Marzec's cooperation and testimony, the Government would not have been able to indict the other three defendants and to successfully prosecute two of them, Sobieraj and Brandt. At the time petitioner was sentenced, the Government grudgingly admitted: "I think it is true that if Mr. Struett had not come voluntarily to our office it is doubtful if indictments against the other three could have been returned • • • ", " • • • In effect, it was Marzec only who could have put the cash sums in the hands of the other three defendants. He did certainly give evidence to the Grand Jury, essen-

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January 23, 1957, setting his case for trial on February 4, 1957, and for a continuance of the trial date awaiting executive clemency or dismissal, and in the alternative, for a motion for a continuance of the trial date to the October, 1957 term of court, (petitioner's counsel was to be out of the country on a World Cruise from about April 1 to July 1, 1957, of which fact the Government admittedly had knowledge from September of 1956) to enable petitioner's counsel to prepare preliminary motions on his behalf and to prepare for trial if they were denied (A. 28-88). This verified motion is often referred to herein. These facts were not denied in the Government's answer to said motion (A. 80-86).

These same facts often appear in one form or another in the offered or received evidence at the trial. The trial court refused to permit Marzec as part of his case to show anything beyond the time his case was referred to the Department of Justice in September of 1952 (G. A. 380), and kept practically all of these facts out of evidence. They were covered by many offers of proof (G. A. 292; 371-381; A. 212-217, Offered testimony of Mr. Rieger, one of petitioner's counsel; A. 228-233, Offered testimony of petitioner's accountant).

The Government then did an about face and cross examined Marzec on the subsequent events, thus opening up the entire matter. As a result, some of the facts got into evidence. but only in a haphazard and derogatory way in so far as Marzec was concerned. The trial court still refused to admit many of the facts in evidence, and particularly the documents Marzec had prepared for the use of the Government. This phase of the case is fully covered in petitioner's motion for a new trial (A. 283-286).

As this Court can well appreciate, if petitioner was subjected to a trial by an over-zealous prosecutor and a partial judge, with his counsel unprepared, the result would have to be a poor trial record, most difficult to follow, and with every conceivable kind of error.

tial evidence to indicate the financial payments to the other three * * * " (Proceedings of February 21, 1957, pp. 26-27).

THE DENIAL OF ASSISTANCE OF COUNSEL.

The court below relied upon the fact that the indictment in this case was returned on December 15, 1955, that it was pending some fourteen months, and that on December 5, 1956, by agreement, this case had been specifically set for trial on February 4, 1957, to reject petitioner's contention that he was forced to trial on February 4, 1957, without benefit of prepared counsel.[8]

The court omits from its opinion most of the pertinent facts. During the pendency of this case Marzec was kept joined with these other defendants even though he was a necessary Government witness against them.

On January 23, 1957—twelve days before the joint trial date—the Government for the first time in an admitted "drastic change" of position (A. 19) came forward and made its true intentions as to Marzec "crystal clear." It then, by way of an unverified motion and in open court, first turned on Marzec, denied any deal with him, questioned his asserted right to immunity, of which it had knowledge as far back as November 8, 1954, sought a severance as to him, and sought to try him before Brandt and Kusper. It sought to try petitioner on February 4, 1957, well knowing his counsel had made no preparation for trial and was unprepared, and after it had continuously concealed from and refused to disclose to petitioner's counsel its true intentions as to how it intended to proceed with all defendants joined. These acts took place after: (1)

8. The trial court—as did the court below—disposed of this matter on a clockwise basis, rather than in the light of the facts and conditions existing as of January 23, 1957 (*Avery* v. *Alabama*, 308 U. S. 444, 446).

it had obtained a plea of guilty from Sobieraj; (2) had been assured of a plea of guilty from Brandt; (3) had probably determined to dismiss Kusper; (4) had received the full benefit of Marzec, his cooperation and Grand Jury testimony; and (5) after it had no further use for Marzec, his counsel or his trial testimony. Its statement that it intended to try Brandt and Kusper after Marzec was a sham in that there was to be no one else to try, as subsequent events proved.[9]

The trial court refused to permit petitioner's counsel to answer said petition as is required by Court Rules (A. 29) and set petitioner's case for trial on February 4, 1957. This prompted petitioner's motion to vacate, etc.

In its answer to petitioner's motion to vacate, the Government admitted that it had knowledge from January 12, 1956 of the asserted right of immunity, but alleged that it had advised petitioner's counsel continuously from said date that it would not recognize said claim, that it desired to proceed with a joint trial of all defendants, and that

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9. These facts fully appear in petitioner's motion for a severance (A. 7); the Government's answer thereto (A. 8); petitioner's reply (G. A. 6); the proceedings of January 23, 1956 when it successfully opposed petitioner's motion for a severance by insisting that a joint trial could be had, and misrepresenting that its case against these others was not dependent upon Marzec's testimony (G. A. 8-35, 31); its motion for a severance for Marzec (A. 15-16); the proceedings of January 23, 1957 (A. 18-27); petitioner's motion to vacate the order of January 23, 1957, setting his case for trial on February 4 and for a continuance (A. 28-78); its answer thereto A. 80-86); and the proceedings at the time of sentence on February 21, 1957. As appears from said proceedings, the Government had at least a tacit understanding, as far back as the fall of 1956, with counsel for Brandt and Sobieraj that their clients would plead guilty. The authority to dismiss the indictment against Kusper was dated January 31, 1957 (A. 288).

The Government nowhere denied that it had been continuously advised and knew that petitioner's counsel was making no preparation for trial and was unprepared for trial. It wanted to "catch" petitioner's counsel by "surprise" and unprepared. It did (A. 52, 55).

if Marzec was granted a severance, it would proceed against him first and then the others (A. 82). Having then such asserted knowledge and intentions, it had ample opportunity to and was then duty bound in fairness to all defendants and particularly petitioner to have then brought them forth, disclosed them, and effectuated them when petitioner filed his legally sufficient petition for a severance on January 16, 1956, and the matter came up in court on January 23, 1956.[10]

The facts relied upon by the court below to reject petitioner's contention that he was subjected to trial without prepared counsel do not establish that petitioner's counsel was prepared for trial, though from some of the language used one might glean that the court below so concluded. Probably the court below reached the same conclusions as those expressed by the trial court upon the urgings of the Government; namely, that "such preparations as were necessary to be made should have been made during the interval," December 15, 1955 to February 4, 1957 (A. 89), and that "if you are not prepared, it is your own fault" (A. 189), and that "you should have gotten this case ready for trial" (A. 254).[11]

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10. Had the Government on January 23, 1956, joined in petitioner's motion for a severance, denied any deal with him, questioned his right to immunity, and urged that he be tried first—as it did just one year later—the entire complexion of this case would have been changed and petitioner and his counsel would have been compelled to proceed much differently than they did. The Government could not then in good conscience so act, even if it was required to misrepresent to the trial court that its case against the others was not dependent upon Marzec's testimony (G. A. 31) in that on January 23, 1956 it still required the cooperation and testimony of Marzec against his co-defendants. Yet, in its answer it would deny any "agreement" existed which would lead petitioner's counsel to believe that preparation for trial was unnecessary (A. 86)!

11. Apparently, the Government, the trial court and the court below were of the opinion that petitioner's counsel was duty-bound

Petitioner's motion to vacate and for a continuance awaiting executive clemency and alternatively for trial preparation was denied on February 4, 1957, because the case had been pending a long time and such preparation as was necessary should have been made during that period. Petitioner was immediately put to trial without benefit of prepared counsel (G. A. 121).

THE "CORRUPT RECORD."

The Government had ample quantitative evidence, oral and documentary and particularly certain summary sheets (D. Ex.'s 45 and 46) furnished it by Marzec—which it had accepted, recognized the accuracy thereof, approved and used to its benefit and as a basis for the indictment against all defendants, including Marzec—establishing not only that Marzec had distributed most of these cash commissions to these other three and the total amounts distributed to each, but likewise that he had retained his share thereof and the total amount he retained. From this evidence, as the court below was advised, the Government could have readily and easily established the charges of its indictment against Marzec.[12]

Having accepted, approved, and used this evidence as its own, the Government would seem to have been bound by it, even though much of it was beneficial to Marzec. However, at the trial it again shifted its position, disregarded Marzec's furnished evidence, disparaged and belittled all of it

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to work with the attorneys for the other joined defendants in preparing for a joint trial, even while he was working with the United States Attorney against them and while the interests of his client were antagonistic to the interests of their clients—which he would not do (G. A. 86).

12. To do so, the government did not require the testimony of Sobieraj; Kusper or anyone (Worcester) on his behalf, or Brandt. Marzec was a required witness against these others and not these others against Marzec.

both as to its significance and extent (G. A. 392, 411-422, 503-511) and persuaded the court to exclude most all of it when it was offered by Marzec as a part of his case.[13]

Marzec and his accountant had prepared these summary sheets (supported by petitioner's net worth statements) from union records and a few fragmentary memorandums he still retained, showing at least that he had shared these cash commissions with the other defendants (D. Ex.'s 34 to 42, G. A. 503, 511). They showed specifically the amounts of commission Marzec had collected, and distributed, from what brokers, on what buildings (there was in excess of 150 of them), the total commissions distributed to each of the parties for the years in question, and the commissions he retained. The exclusion of these summary sheets left Marzec with no record evidence as to the total amount of the commissions he had distributed to the other three, and their exclusion was most erroneous and prejudicial.[14] This

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13. Petitioner maintained before and at the trial that the Government, having accepted Marzec's furnished information, having investigated further, and having obtained this indictment, of necessity had in its possession material evidence beneficial to Marzec which it could not conceal, but was duty bound to produce (A. 46, 61, 90, 173, 273, 274). The concealment of and the failure to produce such evidence, the casting of aspersions on Marzec's furnished evidence, and the keeping of most of it from the jury was unconscionable (*United States* v. *Reynolds*, 345 U. S. 1, 12) and contrary to the basic concepts of fair play (*United States* v. *Morgan*, 304 U. S. 1, 22). The interests of the Government was not that it should win a case; but that the true facts be passed on by the jury so that justice could be done (*Berger* v. *United States*, 295 U. S. 78, 88).

14. The trial court refused to admit these summaries in evidence on the theory that they were manufactured evidence after the event (A. 225, 233). So is most every summary. They were consistent with and supported by the evidence received in the case, particularly the testimony of the brokers as to the amounts of the commissions they paid Marzec and on what buildings; the union records received in evidence (A. 94-96) and Marzec's testimony as to how he had distributed the received commissions between the others and himself. Marzec was not required to take each building and reaffirm the amount of commission he had re-

error was magnified when the Government repeatedly urged upon the jury that Marzec had failed to prove the specific amounts he had distributed to the other three defendants (G. A. 444-446, Motion for New Trial, A. 290-292).

Having used Marzec, his summaries, etc., as aforesaid; having procured this indictment charging all parties with being in a joint venture; and having by subsequent pleadings and in open court affirmed and reaffirmed that Marzec was a mere collector of these cash commissions, a mere conduit for most of them to the other three; and that the unreported income of each was only "his respective share of the proceeds of the joint venture" (A. 9)—all of which acts would seem binding upon the Government—it again drastically shifted its position and did an about face at Marzec's trial.

It undertook not only to charge Marzec with his "respective share" of the proceeds of the joint venture, but also a part of Sobieraj's "respective share" by means of the knowingly false testimony of Sobieraj to the effect that all the commissions he received from Marzec, checks and cash, were turned into the partnership with his mother-in-law and their receipt reflected in a little black book (G. Ex. 33), the partnership record (Tr. 212, 213, 241, 245).

It then undertook to charge Marzec with Kusper's share of these cash commissions by the knowingly false testimony of Special Agent Worcester, who had been the chief aide of the United States Attorney in the preparation of this case, even prior to the return of the indictment (A. 228). Worcester testified that he could find no evidence and the Government had no evidence that Kusper had received a part of these cash commissions (G. A. 302-5). For

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ceived, its distribution separately and in total. This was all a matter of summary. He and his accountant could have prepared identical summaries at the time of his trial from the evidence in the record.

detailed facts and an analysis of the testimony of Sobieraj and Worcester, see Appendix C, *infra,* pp. 57-61.

Contrary to the charges of the indictment, the Government's subsequent pleadings, and recognized tax law, Worcester testified that he charged all these commissions as taxable income to Marzec and then conducted an investigation; dehors the record, to determine and verify what "deductions" Marzec was entitled to by way of distribution of these others (G. A. 301). He gave Marzec credit against the whole for only such cash commissions as these others admitted to Worcester they had received, though all three had previously denied the receipt of any cash commissions in the affidavits they gave to the investigating agents and again before the Grand Jury. Since Brandt had admitted to Worcester the receipt of substantially all the commissions Marzec asserted he had paid him, Marzec got credit for these (G. A. 302).

Worcester gave Marzec credit for all the commissions he had distributed to Sobieraj by checks either payable to him or the partnership. Approximately $2500 of said checks never reached the partnership and their receipt was not reflected in (G. Ex. 33), "our" partnership book (G. A. 346, 352, 394, 395; G. Ex. 33A-B). As to the cash commissions Marzec had distributed to Sobieraj, Worcester, consistent with Sobieraj's false testimony gave Marzec credit for only such cash, the receipt of which was reflected in said book (G. A. 301, 302). Worcester's own computations (G. Ex. 33A & B) disclosed his knowledge that Sobieraj was not turning into the partnership all the commissions, checks and cash, that he was receiving from Marzec.

As to Kusper, though the receipt of these cash commissions was the entire basis of the indictment against him, Worcester, consistent with his own false testimony, gave Marzec credit against the whole for *none* of said cash

commissions he had distributed to Kusper, but only for the B. Repsuk and Kusper checks since Kusper had again denied to Worcester the receipt of any of such cash commissions and their receipt was not reflected in Kusper's books which Worcester testified he had examined (G. A. 303). The thought did not occur to the Government, the United States Attorney, or him that the receipt of these cash commissions by Kusper would not be reflected in his books, and if they were, Kusper would not have permitted their examination.

Worcester's testimony and his computations were a fraud on the court and on Marzec (Motion to withdraw a juror, A. 276). His attempt, in the first instance, to load on Marzec all these commissions as unreported income was, of itself, prejudicial error, *Singer* v. *United States* (C. A. 3) 58 F. 2d 74, 75. His testimony as to the *results of his investigation outside the evidence in this case* was also prejudicial error, *Wilkes* v. *United States* (C. A. 9), 80 F. 2d 285; *Olender* v. *United States* (C. A. 9), 210 F. 2d 795; *United States* v. *Ward* (C. A. 3), 169 F. 2d 460. And when he undertook to evaluate the testimony at the trial and the evidence Marzec had furnished the Government accepting part and rejecting part, for various professed reasons (A. 308-9), he "usurped the function of the jury", *Steele* v. *United States* (C. A. 5), 222 F. 2d 628, 630. His testimony and computations were false, incomplete, inaccurate, misleading and a monstrosity of errors. *United States* v. *Altruda* (C. A. 2), 225 F. 2d 935, 942; *United States* v. *O'Connor* (C. A. 2), 237 F. 2d 466, 475.

Worcester's computations of Marzec's supposed unreported income were based on this testimony of Sobieraj and himself. The determination of the tax expert, Ruggaber, as to the "true tax due" from Marzec was in turn based on the computations of Worcester (A. 182-190). Objections as to the admissibility of or to strike all of this

evidence was made and overruled at one time or another (G. A. 244, 313, A. 182, 183, 236, 237).[15]

The indictment, the Government's subsequent pleadings and its own acts and admissions cast "the darkest shadow upon the truthfulness of" the testimony of Sobieraj and Worcester. Confronted with these facts on the one side and their testimony "suspect of taint" on the other side, the trial court in proper solicitude of the rights of petitioner was duty bound to have ascertained where the truth lay between these conflicting situations, both brought about by the Government. The trial court should have, on its own motion, required a full accounting from the Government for its conflicting actions and should have required it to produce all evidence pertinent to this matter, and resolved same, before it permitted the Government to proceed further. The *Shotwell* case. (Mo. to withdraw a juror etc., A. 266-277.)[16]

Instead, during the cross examination of Worcester the trial court refused to permit petitioner to develop the fact that Kusper's books would not show the receipt of these cash commissions (G. A. 305); that all three of these defendants had originally denied receipt of them (G. A. 308); that the grand jury had found that Kusper had received part of this cash (G. A. 307) and what evidence the government had in their files to show his receipt

15. On this record, it should not be too difficult to comprehend why petitioner's counsel, in the court below, urged that "the government has gotten itself into the ridiculous position of not having established by competent evidence unreported income and a tax due for the years in question".

16. The basic utterances of this Court in its opinion in the recent case of *Jencks* v. *United States*, 356 U. S. 657, and the interpretation of said opinion by the court below (*United States* v. *Killian*, C. A. 7, 246 F. 2d 77, rehearing granted 8-19-57, 82) would also seem most applicable to this situation.

thereof (G. A. 305).[17] It then refused to permit Marzec to fully develop these latter facts (A. 190-196, 226-227).

The trial court kept the B. Repsuk checks out of evidence because they were not relevant to any issue in the case and would only confuse the jury (A. 222). Ninety per cent of the check distributions Marzec made to Kusper were made by such checks (G. A. 252, 258, 303). Kusper's sharing in these commissions under such circumstances should be some evidence that he was also sharing in these cash commissions. These checks not only corroborated Marzec's information and testimony and the charges of the indictment against Kusper that he had also shared in these cash commissions but likewise reflected on the truthfulness of Worcester's testimony to the contrary. As appears in Appendix C the Government had much additional evidence establishing that Kusper had so shared, some of which was admitted in evidence and some of which was denied admission.

The Government, by and through the testimony of Worcester as to Kusper, was on its way to again stifle the prosecution of Kusper and to frustrate the very action of the Grand Jury it induced. (Mo. to declare mistrial A. 272-273). The sequence of events: on January 23, 1957, it first turned on Marzec; on January 31, 1957, authority was obtained to dismiss Kusper; on February 7, 1957, Worcester testified at the trial of Marzec that the Government had no evidence against Kusper; and on February 18, 1957, it dismissed the indictment against Kusper for insufficient evidence![18]

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17. It was this same type of limitation on cross examination by the same trial judge which caused the Solicitor General to confess error and this Court to reverse the decision of the court below in the *Kretske* case, *United States* v. *Kretske*, 350 U. S. 807; reversing 220 F. 2d 785. See also *Alford* v. *United States*, 282 U. S. 687.

18. Worcester's testimony as to Kusper could well have been a pretense of basis for such dismissal. If so, then such testimony

The testimony of Sobieraj, Worcester, and the latter's computations based thereon were projected into the instructions of the trial court to the jury by way of additional instructions prepared by the Government. The statement of petitioner's counsel that the instructions prepared by the trial court and given were fair and unobjectionable (A. 245) did not apply to those additional instructions (A. 245-251), as the court below concluded. The trial court committed reversible error in submitting this case to the jury without adequate instructions on behalf of Marzec and in giving such additional instructions.[19]

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was "but a further step to 'fix' " Kusper's "tax difficulties possibly involving the corruption of Government officials and certainly entailing an attempt to perpetrate a fraud upon the court", paraphrasing the words of this Court in the *Shotwell* case.

By the same token, Sobieraj's unrequired testimony given against Marzec could well have been but a pretense of basis for the representations as to how helpful he had been to the Government made by his counsel and the Government to the trial court at the time of sentence to urge his probation. By the same token, the keeping of Brandt around the courtroom during the trial of Marzec to give unrequired testimony against him could well have been designed to obtain from the trial court favorable treatment for Brandt upon similar representations. It seems clear beyond argument that all three of Marzec's superiors benefited as a result of his prosecution.

19. The charges of the indictment and the government's position as asserted in subsequent pleadings were consistent with recognized tax law. The position and action of Worcester as reflected by his testimony and computations *were not*. Under the Internal Revenue Code of 1939 (Sec. 3797(a)), a joint venture, for tax purposes, is treated as a partnership, and proof of the receipt of income by one member of a joint venture does not make it the income of such member, but rather of the partnership or joint venture, *Bartholomew* v. *Com'r*, 186 F. 2d 315 (C. A. 8), 1951; *Brady* v. *Com'r*, 25 T. C. 682 (1955); *Estate of Koen* v. *Com'r*, 14 T. C. 1406, 1409 (1950); and *Abbott* v. *Com'r*, 30 B. T. A. 227, 229 (1934).

It was reversible error for the trial court to have denied petitioner's counsel time to prepare instructions on his behalf and to have then submitted this case to the jury without adequate instructions on Marzec's behalf and on his theory of the case. *Tatum* v. *United States*, (C. A. D. C.), 190 F. 2d 612, 617, cited with approval in *United States* v. *Phillips* (C. A. 7), 217 F. 2d 435.

The trial court most erroneously instructed the jury that the

THE SENTENCES.

Petitioner's motion for judgment of acquittal and in the alternative, for a new trial (A. 280-286) was denied on February 21, 1957. Brandt, Sobieraj, and Marzec then came up for sentence.

Counsel for the first two emphasized how much time and expense the government had been saved by and through their pleas of guilty and how helpful they had both been to the government; Sobieraj, by his given information and testimony; Brandt, by agreeing to testify for the government against Marzec and waiting around the court room to be called if necessary. They both urged pre-sentence investigation and probation for their clients. The United States Attorney confirmed their representations; affirmed that they had been helpful; emphasized the difficulty of proving a case against them and, in effect, advised the trial court that he had no objection to probation for them. He stated he had no objection to pre-sentence investigation.

Sobieraj, who had given the investigating agents a false affidavit that he had not shared in these cash commissions; who had falsely testified to like effect before the Grand

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testimony of Worcester (and Ruggaber) and the exhibits prepared by them "*were offered* and are to be construed by you only as an explanation by the witnesses *as to what the evidence and the exhibits in this case show*". (A. 264). That was not the purpose of Worcester's testimony. Part of his testimony was *dehors* the evidence in this case and he undertook to evaluate the evidence in this case. Implying that all these commissions collected by Marzec represented taxable income to him, the trial court instructed that the government was not required to prove "*that the defendant did not have unreported expenses or deductions which might offset such unreported receipts*". It thus most erroneously instructed the jury contrary to the charges of the indictment, the government's avowed theory of the case and the correct principles of law applicable to it—and shifted the government's burden of proof onto Marzec, *United States* v. *Indian Trailer Corp.* (C. A. 7), 226 F. 2d 595, (A. 263.)

Jury; who had stood in defiance of his government continuously until February 18, 1957, when he pled guilty, and who then, thereafter falsely testified at the trial of Marzec and again attempted to lie out of the receipt of all of the commissions he received, was placed on probation for one year, receiving no punishment.

Brandt, who had furnished the investigating agent with a false affidavit that he had not shared in the cash commissions and who had testified to like effect before the Grand Jury and who had stood in defiance of the government until shortly before his plea of guilty on January 28, 1957, and who finally admitted that Marzec had distributed cash commissions to him in substantially the same amounts claimed by Marzec, was sentenced to one year but denied probation.

Kusper, who had furnished a similar affidavit, similar Grand Jury testimony, and advised Worcester of similar effect and who still stood in defiance of the government, had previously been "rewarded" by having the indictment against him dismissed on February 18, 1957.

The situation was much different when it came to petitioner. The trial court, first, cast aspersions on his counsel saying: "I won't try to characterize the sort of representation the defendant, Marzec, has had during the prosecution of this law suit." Later, directing his remarks against Marzec stated: "It has been the Court's observance that he stood in defiance of his government and that he has attempted to hoodwink a jury, as well as having committed the crime of which he stands convicted by the jury.[20]

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20. Considering all these remarks of the trial court in relation to all the facts, they should furnish strong evidence that petitioner had been subjected to trial by a biased and prejudiced judge with a bent of mind which may have prevented and impeded impartiality of judgment (*Berger* v. *U. S.*, 255 U. S. 22, 33). This lack of impartiality was reflected in many of his rulings during the trial and was certainly projected into the sentences he imposed.

Marzec, the "mere" employe and collector, who, as far back as 1954, fully cooperated with his Government; who was responsible for bringing the real culprits to the Bar of Justice; whose counsel informed the court and jury of the true facts; who availed himself of his constitutional right to a trial by jury and testified truthfully on his own behalf, was given a sentence of three years in the penitentiary and denied probation.

Ours being a government of laws and not of men, such an over-all use of our administrative and judicial processes with such end results should constitute a denial of due process and most certainly is obnoxious to the four little words upon the home of this Court.

REASONS FOR GRANTING THE WRIT.

This case presents several important questions of criminal law which have not been, but should be, settled by this Court.

I.

This Court held in *The Whiskey Cases,* 99 U. S. 594, that an accomplice who comes forward and freely admits his culpability, and at the instance of the prosecution furnishes information and testimony against his confederates in crime, acquires an equitable right to immunity. And that it was the duty of the trial judge to protect that right by continuing the trial date pending executive clemency or dismissal. The court below was of the opinion that the doctrine had been abolished by the enactment of the Federal Probation Act. But other circuit courts have thought otherwise. See *Russell* v. *United States,* 12 F. 2d 683 (C. A. 6); *United States* v. *Levy,* 153 F. 2d 995 (C. A. 3), and *Healey* v. *United States,* 186 F. 2d 164 (C. A. 9). These cases were decided after the enactment of the Federal Probation Act and there appears to be a direct conflict between the decisions of the various Circuits as to whether the rule enunciated in the so-called *Whiskey Cases* is in effect today.

The Federal Probation Act unquestionably gives a trial court authority to suspend the imposition or execution of sentence and to place a defendant on probation upon such terms at it deems best. However, it does not take away from a defendant his right to equitable relief. If the Probation Act was intended as a substitute for the equitable rights of an accomplice as defined by this Court, then under the facts presented here, petitioner was entitled to probation and the failure of the trial court to grant him probation

was clearly an abuse of discretion. If the court below is right, an accomplice who supplies the Government with evidence acquires nothing but the right to plead guilty—a right accorded any defendant.

The court below said there was no evidence of any promise of immunity to petitioner. In saying this, it overlooked the fact that his information and testimony was used in obtaining the indictment against all the defendants and that the Government later admitted that without his help "it is doubtful if indictments against the other three could have been returned."

It seems clear from the *Whiskey Cases* that the immunity involved here does not necessarily depend upon an absolute promise of immunity by the prosecutor. The immunity springs from the acceptance by the prosecutor of the aid and assistance of the accomplice. It is clearly equitable in nature, and "arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence." *Lovely* v. *United States*, 169 F. 2d 386 (C. A. 4).

It has been recognized for years that in many cases the interests of justice require the testimony of accomplices as against their confederates in crime, and that the Government should not accept such benefits without some corresponding obligations. A due and proper administration of our criminal laws requires that the right of such an accomplice be defined, since much doubt has been cast upon his rights by the decision below.

II.

Petitioner was denied the assistance of counsel at his trial under most unconscionable circumstances. Relying on the fact that petitioner was a required Government witness against these others, and his right to immunity, petitioner's counsel had filed no preliminary motions on his behalf,

other than his motion for a severance, and had made no preparation and was unprepared for his individual trial. He continuously so advised the Government as the agreed joint trial date approached, seeking, with little success, clarification of how the Government intended to proceed at the trial with Marzec as a required Government witness.

On January 23, 1957, in an admitted drastic change of position, the Government no longer requiring the petitioner, his cooperation or testimony, denied any deal with him and sought to try him first, well knowing that his counsel was unprepared. The trial court so ordered. This prompted petitioner's motion to vacate said order and for a continuance, wherein the above facts were alleged. The Government in its answer to said motion did not deny them. Petitioner's motion was overruled on February 4th and he was forced to trial immediately, without benefit of prepared counsel.[21]

As affirmed and reaffirmed by this Court, under the Sixth Amendment to our Constitution a defendant in a criminal trial in our Federal courts is entitled to the Assistance of Counsel, effective counsel, and prepared counsel; that this right is of a most fundamental character and cannot be abridged, interfered with, or impinged upon in any manner; that it is so absolute that when a denial of it is made to appear, courts are not permitted to indulge in nice calculations as to the amount of prejudice arising from such denial; and that a trial judge has a positive and solemn duty to conduct a trial with the greatest solicitude for those rights and to insure their fullest protection at every stage

21. The record indicates that petitioner's counsel had never before in any case, and he had tried many, filed a petition seeking a continuance because he was unprepared; that in all said cases he tried, whether for a plaintiff or a defendant, he never entered the trial unless and until he was most fully prepared for trial and that his experiences here were most harrowing. (Motion to withdraw a juror and declare a mistrial and alternatively for a continuance of ten days, A. 267-277).

of the proceedings. *Powell* v. *Alabama,* 287 U. S. 45, 59; *Johnson* v. *Zerbst,* 304 U. S. 458, 463; *United States* v. *Glasser,* 315 U. S. 60, 71; *Hawk* v. *Olson,* 326 U. S. 271, 278. See also, *United States* v. *Koplin,* 227 F. 2d 80 (C. A. 7).

The facts as set forth above and undenied were far more controlling in determining the applicability of the above utterances of this Court than was the fact that clockwise this case had been pending for some fourteen months. Assuming, but denying that petitioner's counsel was at fault in some way, petitioner should not have been penalized particularly under the facts and circumstances of this case.

III.

Having been forced to trial with unprepared counsel, petitioner was then subjected to a "trial" without precedent. Everything detrimental to him was admitted in evidence, and most everything beneficial to him was kept out of evidence. For fear he would not be convicted, he was then confronted with a "corrupt record". The government of a strong and free nation does not need such convictions. *Mesarosh* v. *United States,* 352 U. S. 1, 14.

As shown above, there was a continuous and flagrant denial of due process throughout all these proceedings. It began with the investigation by the agents, and ended with the sentences imposed. Due process is not a yardstick. Its "standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia." Due process "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses." (Concurring opinion, Mr. Justice Frankfurter, *Adamson* v. *Cali-*

fornia, 332 U. S. 19. To the same effect see *United States ex rel. Montgomery* v. *Ragen,* 86 F. Supp. 382 (N. D. Ill.).)

The whole proceedings both administrative and judicial which were directed against the petitioner were most unusual. The Internal Revenue Service, in referring this case to the Department of Justice for prosecution, allocated all of such commissions to the petitioner, ignoring the fact that at least three-fourths of the commissions had been received by others. It recommended only the prosecution of petitioner. Upon learning this, petitioner advised the United States Attorney that there were others of far greater guilt involved and offered to disclose and furnish facts showing to whom the "commissions" had been paid. The Government later admitted its indebtedness to petitioner for the testimony he had given, which enabled it to proceed against the others. Yet, the petitioner was sentenced to three years imprisonment. As to the others of at least equal guilt; one was absolved; another received no punishment, probation; and the third a minimum, one year. "When, however, they (criminals) are convicted through a denial of a substantial right extended to them by their government, they can but despair; and when the courts permit a construction of the law which makes the government break faith with individuals, whether offenders or not, then the reason for the courts has ceased and justice is no more." *United States* v. *Pardue,* 294 Fed. 543, 548 (S. D. Tex. 1923).

Whether or not petitioner was guilty of tax evasion, he was entitled to due process which, of course, includes a fair trial and fair treatment. He was denied both.

CONCLUSION.

The decision below is erroneous and out of harmony with rulings in other circuits and this Court. It presents questions of substantial importance in the enforcement of the penal provisions of the Internal Revenue Code. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

No. 11979. September Term 1957—September Session 1957.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH T. MARZEC,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 13, 1957.

Before DUFFY, *Chief Judge,* SCHNACKENBERG and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* This is an appeal from a judgment entered on a jury verdict finding the defendant Joseph T. Marzec guilty of income tax evasion.

In his summation to the jury, counsel for the defendant, Mr. Joseph A. Struett, said:

> "There isn't any question in this case and never has been that Mr. Marzec is guilty in the sense that he failed to report his income in the years in question in the amounts he should have at the time he should have.
>
> I couldn't argue conscientiously to you people otherwise. He has told the Government that and he has admitted it to me and I am not going to deceive you.",

and in his brief he informs this court that:

> "Marzec certainly is not without culpability herein and in a sense is guilty in that he did not report his

> true taxable income for these years nor pay taxes thereon."

However, defendant contends that he was subjected to abuse and misuse of the administrative and judicial processes in the bringing about of his conviction and sentence.

On December 15, 1955, an indictment in eight counts was returned against Frank A. Brandt, Stanley T. Kusper, Bruno J. Sobieraj and the defendant charging them with a violation of Title 26 U.S.C.A. § 145(b) in failing to report their respective shares of the proceeds of a joint venture for the years 1949 and 1950. Counts 1 and 2 so charged Brandt, Counts 3 and 4 Kusper, Counts 5 and 6 Sobieraj and Counts 7 and 8 Marzec.

The defendant contends that he had an equitable right to immunity and it was reversible error for the trial judge to have refused to recognize and protect that right by not continuing his trial date pending executive clemency or dismissal.

There are many reasons why this contention is entirely without merit. First and foremost is the fact that even if there did exist the doctrine of common law approvement in our federal court system as the result of the Supreme Court's decision in the *Whiskey* Cases, 1879, 99 U.S. 594, the enactment of the Federal Probation Act has, for all practical purposes, abolished the doctrine. *King* v. *U.S.*, 8 Cir., 1953, 203 F. 2d 525. Secondly, there was no evidence of any promise of immunity to Marzec. To the contrary the testimony of Robert Klenha, a Special Agent in the Intelligence Division of the Internal Revenue Service, was as follows:

> "This is the instrument that I was particularly concerned about. The form it was in and the implications of the tender caused me to tell Mr. Struett and Mr. Marzec that I could not accept any of these things on behalf of the Revenue Service with any conditions or any strings attached to it; that I

couldn't accept this as absolving Mr. Marzec of any responsibility or liability that he was open to.

I also offered to accept these for what they were worth, but again with that condition that we would not be bound in any manner by way of a grant of immunity or extending a hope of reward to Mr. Marzec.

I believe I did not put it in quite that language, I repeated myself a number of times that I could not accept these with any strings attached; and Mr. Struett kept tendering these to me, and I kept handing them back to him. I believe that it was a cause for some particular comment later on, the way we handed these instruments back and forth between Mr. Struett and myself."

Thirdly, the indictment was returned on December 15, 1955. The cause was assigned for trial on January 9, 1957, over a year after the return of the indictment, and on December 5, 1956 the cause was continued to and reassigned for trial on February 4, 1957 by agreement of counsel for the parties. If Marzec was sincere in his claim to an equitable right of immunity he had many months prior to trial to move in that direction and yet he did absolutely nothing. It is, therefore, crystal clear that under no circumstances can Marzec contend that he had an equitable right to immunity.

This court has repeatedly held that the trial court's action on an application for a continuance is purely a matter of discretion and not subject to review unless it is clearly shown that the discretion has been abused. *U. S.* v. *Yager,* 7 Cir., 1955, 220 F. 2d 795. This record shows no abuse of discretion whatsoever in fact the showing is entirely to the contrary. This is dispositive of the second contention of the defendant that "the trial judge committed reversible error when he denied Marzec's motion to continue his trial to permit the filing of preliminary motions, a determination thereof, and, if necessary, preparation for trial, but rather forced Marzec to trial with

full knowledge that his counsel was unprepared and denied Marzec his constitutional rights." It is difficult for us to understand how such a theory can be advanced in face of the record in this case showing that it was pending for more than a year between the return of the indictment and the trial and also showing the assignment for trial by agreement of counsel for the parties two months prior to the trial date.

The defendant urges upon us the proposition that a defendant is entitled to a fair trial irrespective of his guilt or innocence. It is undebatable that every party litigant is entitled to a fair trial. However, the defendant contends that the trial judge failed to maintain a fair and impartial attitude during the trial; that he improperly limited defense counsel's cross-examination of government witnesses; that he improperly admitted and refused to strike Worcester's testimony and computations which were false and legally indefensible; that he erroneously excluded Marzec's evidence refuting wilful intent though the United States Attorney had opened the subject on cross-examination and "erred in failing to give instructions on behalf of Marzec but most erroneously instructed the jury."

The defendant sets out in his brief some excerpts of the record in an attempt to substantiate these contentions. One such, as an illustration, appears on page 45 of his brief. It is as follows:

> "By the Court: Any further cross-examination of this witness?
>
> By Mr. Struett: What?
>
> By the Court: Any further cross-examination?"

Immediately following the brief says:

> "This counsel had hardly begun his cross-examination."

When read in context the record shows that counsel for

the defendant then proceeded with his cross-examination and continued until the afternoon adjournment and then continued the following morning with extensive cross-examination. This is characteristic of the other excerpts quoted and when they are likewise read in context there is no indication whatsoever that this defendant was denied any of his rights to a fair trial. He was permitted to fully cross-examine the government witnesses and, in our opinion, the trial court committed no reversible error in its ruling on the evidence.

At the conclusion of all the evidence and after the trial court had heard argument on certain motions of the defendant and ruled thereon, a conference was held between the Court and counsel on the matter of instructions. The defendant had tendered no instructions and counsel for the defendant informed the Court that:

> "I have been over your instructions, they are fair. There isn't any question about it. I have no objection to them, they are all proper, so forth and so on."

If the defendant desired to tender any instructions it was his duty to do so at the close of the evidence. Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. He completely failed to do so and informed the court that he had been over the court's instructions; that they were fair, and had no objection to them. There is no merit to the contention of the defendant that the court erred in failing to give instructions on his behalf or that it erroneously instructed the jury.

The defendant asserts that the United States Attorney introduced false testimony against him; that the United States Attorney's conduct was unconscionable and the government should have been required to produce evidence that was in its files favorable to the defendant. The record does not support these assertions but demonstrates just the contrary.

The defendant finally contends that he was entitled to a judgment of acquittal because the government failed to prove a tax due, and that "these proceedings against Marzec constitute a flagrant denial of due process and are so repulsive to a due and proper administration of our Revenue Laws and criminal justice as administered by our Federal Courts, that no conviction of Marzec should be permitted to stand."

The defendant's evidence alone prove . that he was guilty. His counsel informed the jury in his closing argument that he was guilty and the defendant has filed a brief in this court so informing us. Upon what theory he can contend that he was entitled to a judgment of acquittal because the government failed to prove a tax due is beyond our comprehension.

The defendant's charge that he was subjected "to a hurry-up rush trial with his counsel unprepared and not well" is entirely without foundation. As we have already pointed out this cause was pending some fourteen months between the return of the indictment and the trial and on December 5, 1956, by agreement, it was continued from January 9, 1957 and reassigned for trial on February 4, 1957. The trial commenced on Monday, February 4, 1957 and ran through Thursday, February 7, 1957 when, at the request of counsel for the defendant and after the government rested, it was adjourned to Monday, February 11, 1957 and went to the jury on Wednesday, February 13, 1957.

We have read the entire record in this case and in view of the course pursued by counsel for the defendant we are convinced that the trial judge was not unfair under the circumstances. We are likewise convinced that the defendant was afforded a fair trial and was denied none of the rights guaranteed to him as a party litigant.

The judgment is AFFIRMED.

APPENDIX B.

THE CONSPIRACY.

Introduction.

It was and is the position of petitioner that during the course of the investigation of this case by the Chicago office of the bureau, there may well have been in full force and effect a criminal conspiracy to frame Marzec, to obstruct justice, and to shift onto Marzec all civil and criminal tax liability for all these unreported cash commissions, and to simultaneously relieve these others, Brandt, Kusper, and Sobieraj, of any such liability; that these other defendants, certain investigating agents, Marzec's selected counsel and accountant, and one of the group of brokers (Miller) may well have been members of that conspiracy. It was a part and parcel of said conspiracy that certain of said conspirators, recognizing that, if the true facts were brought out, Marzec would have been recognized and considered only as a required government witness, undertook to and did induce Marzec to keep quiet and deny the receipt of all these commissions on the false representations that, since cash was involved, it would be hard to prove and that if he so acted, they would be able to and would settle all tax liability for said commissions without injury to Marzec, actually intending to put Marzec in the worst possible light with the Bureau, conceal from him the true status of his case, cause his indictment and conviction, stifle the prosecution of these others, and load all civil income tax liability for all of these commissions onto Marzec alone. Of comparable effect, see Indictment United States District Court Chicago, 57 CR 149, *United States* v. *Harold Sullivan, et al.; United States* v. *Shotwell Manufacturing Company, et al.*, ... U. S. ....., decided December 16, 1957.

There were big stakes involved in this conspiracy. Had petitioner alone been indicted and convicted, as these investigating agents intended and recommended, the prosecution of Brandt, Kusper, and Sobieraj would have been stifled, but that was but a part. There was a most substantial civil income tax liability involved, which, under Bureau procedures, had to be disposed of after the disposition of the criminal aspects of this case. Had Marzec alone been convicted, he would have had little chance, if any, to defeat the substantial civil liability for all these commissions which these same investigating agents had set up against him alone. These other defendants would have been free to again falsely deny the receipt of most of them and no one would believe Marzec, a convicted felon, that he was but the collector and had passed most of them on to Brandt, Kusper, and Sobieraj.

It is significant that, as publicly announced, in March of 1957 there was impanelled in Chicago a Federal Grand Jury to investigate malfeasance, misfeasance, official corruption, and favoritism within the Chicago office of the Bureau during the very period that this case was under investigation.[1]

THE FACTS.

We here give the Court the facts and of necessity they must be detailed. It is for this Court to determine their significance. In determining the existence of or nonexistence of this conspiracy its participants and its objectives, the protestations of one or more of the persons who may be involved are far less important than are matters of conduct, acts, explanations, relationships, time elements and the results desired and accomplished. Should

1. Press releases of Howard B. Gliedman, Special Assistant Attorney General, Chicago Daily News and Chicago American, March 7, 1957, and Chicago Tribune and Chicago Sun Times as of March 8, 1957.

such a conspiracy, in fact, exist, then the acts and declarations of each are binding on the others. All as recognized by the law of conspiracy. It should be noted as these facts are developed that Marzec in his testimony refers to many conversations with Miller, Sobieraj, Brandt, Wilson and Richardson. His version of these conversations and their purport and effect in the main stand uncontradicted in the record, though Miller, Wilson and Sobieraj all testified as government witnesses; Brandt admittedly was available as a government witness and Richardson was under subpoena as a government witness. It should also be noted that most of the incriminating facts herein come, not from Marzec, but from the testimony of the government's own witnesses. Their varied versions or explanations of the same situations often are most pertinent to the issues here presented. These facts are also to be considered in relation to the duty of investigating agent to check leads and ascertain the true facts. *Holland* v. *United States,* 348 U. S. 121, 135-136.[2]

The investigating agents of the Bureau had full knowledge from practically the inception of this investigation: (1) that Marzec a clerical employee was but the collector [broker Miller as a government witness testified he so advised them (Tr. 183-4)]; (2) that Marzec was collecting large sums by way of commissions, approximately $60,000 in 1949 and $90,000 in 1950 from all the brokers involved and the circumstances under which he was collecting same (mostly in cash) (Tr. 400-402); (3) that he was distributing at least part of these commissions to at least Sobieraj and Kusper, the latter under most suspicious circumstances (the Rupsek checks); (4) that Kusper was

2. The testimony of all witnesses here discussed is set forth in full in the Government Appendix with page references to the original Court Reporter's transcript. Since we shall here deal with specific facts we shall use these transcript references. (Tr. .....)

involved in the receipt of these cash commissions in that before broker Milton could obtain a loan from the Union, he was required to deposit in escrow with Kusper a cashier's check of his attorney for $2,600 duly endorsed (A. 100-102, 105-107); (5) that in at least one instance Brandt had refused to accept a check of $1000, insisting on the cash (Miller, Tr. 176-8) and the thought had occurred to one of them, a special agent of twenty years' experience, that "an employee in an inferior position must have had to share in any money he collected" (Wolfe, Tr. 442-3).

Despite this knowledge and these thoughts, these agents for all practical purposes made no real investigation of this case. They called Marzec in and in the presence of "his" accountant Wilson asked him a few questions, permitted him to deny the receipt of any commissions from one broker and permitted him, when asked if he had shared these commissions with officers of the Union, to state that he had reported all of his income and, according to them, later permitted Marzec to say he "didn't care to talk." (Tr. 432.) Then they charged the entire tax liability, civil and criminal, for all these unreported cash commissions onto Marzec alone and recommended his prosecution only. They simultaneously sought to, and did, relieve Brandt, Kusper, and Sobieraj of all tax liability, civil and criminal, and to stifle their prosecution. Only through the vigorous action of the United State Attorney (there was the same United States Attorney involved throughout all these proceedings), with the solicited aid, information and testimony of Marzec, were these others brought to the Bar of Justice and indicted, all despite vigorous opposition of representatives of the Bureau, Internal Revenue Service. Such opposition was a confirmation of their determination to stifle the prosecution of these others and to relieve them of all civil tax liability.

Early in the investigation, broker Miller advised Marzec

that he had discussed the matter with Kusper, Brandt, and Sobieraj and they had told him, Miller, that he should advise Marzec to hire a lawyer, and Marzec told him that he would check the matter with these others. (Tr. 641.) Marzec then testified that he went to Brandt, told Brandt of his conversation with Miller and Brandt said he agreed that Marzec should get a lawyer because "this cash is not disclosed and we will settle this matter later on after the investigation is completed." (Tr. 643.) Marzec then went to Sobieraj and told him of his conversation with Brandt and Sobieraj told him to just keep quiet and "when this is all investigated—we will settle the bill." (Tr. 643.) Marzec then went back to Miller, who recommended lawyer Richardson. (Tr. 643-644.) Miller then phoned Richardson and he came over to Miller's office and they discussed the whole case, and subsequently had other meetings in which they discussed the loans that were made and the way the commissions were paid. The trial court was of the opinion that these facts did not "mean that they hired a lawyer for him." (Tr. 666.) This was a factual question for the jury. The trial court did not care whether Richardson at the time of his "employment" asked for or received any money from Marzec (Tr. 667)[3], and refused to let Marzec show these circumstances. (Tr. 657.)

Richardson later recommended to Marzec that he also employ an accountant by the name of Wilson. Wilson came to Marzec's house where Marzec met him for the first time and employed him either in the latter part of 1950 or the first part of 1951 and explained to him the true facts. (Marzec, Tr. 643 to 649, G. A. 359 to 362.) Wilson

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3. The trial court struck Marzec's first conversation with Miller as being immaterial (Tr. 641-642), and even after Marzec had confirmed this conversation with Brandt and Sobieraj, the trial court refused to change his rulings. (Tr. 719-721.) The trial judge considered broker Miller's role herein similar to that of a policeman on the corner! (Tr. 720.)

testified that he was employed by Marzec during the year 1951, that he was first hired by him in the latter part of 1950 and he was referred to Marzec by Richardson who had called him and he went out to Marzec's home. (Tr. 250 to 252.)

This investigation was commenced according to Revenue Agent Osheroff on September 27, 1950, when he went to Marzec's home and asked him for his records for the year 1949, and for a copy of his returns for that year, and compared the records with the return. Osheroff testified that the next day he received a telephone call from accountant Wilson in which the latter said that he had been employed to represent Marzec in the income tax matter which had come up although Osheroff had mentioned nothing about a possible tax deficiency to Marzec the previous day. Osheroff was certain that he had this conversation with Wilson the day after he had visited Marzec's home, and that he had made a memorandum thereof at the time. (Tr. 409-410.) Thus, Wilson was employed in this case to represent Marzec by someone long before Marzec knew about it and long before Marzec knew Richardson or Wilson or "employed" either of them. (Tr. 647-8.)

Marzec testified that in the Fall of 1950, in October, November and December, he had a conversation with Miller in which Miller advised him that from the information he, Miller, got from Osheroff, that neither Brandt, Sobieraj or Kusper reported the cash received from these commissions. (Tr. 634.) Thus, it would appear that this early in the investigation Osheroff knew that Brandt, Sobieraj and Kusper were sharing in these cash commissions. Of course, the question arises as to what business Osheroff had in discussing his supposed secret investigation of this Income Tax case with broker Miller. Why was Osheroff giving Miller this information? Then Mr. Marzec went over to Sobieraj and Brandt, advised them

of the information he had obtained, and its source, and they both admitted they had not reported the cash commissions but they asserted that they assumed Marzec had paid the tax. (As to Sobieraj, Tr. 634; as to Brandt, Tr. 640-1.)

Shortly thereafter, Sobieraj called Marzec and said he would like to take him to dinner. Sobieraj had a "friend" whom Sobieraj represented to be an employee of the Internal Revenue Department (unidentified). At this dinner, they went through the procedure of the payment of these loans, Sobieraj received 1% cash on these loans. The "friend" asked whether any one saw the payment and then, when Marzec said "No," he stated that, since it was cash "it would be pretty hard to prove." (Tr. 638.) This testimony was stricken on the theory it was immaterial as to either the issues of a tax deficiency or an intent to evade. (Tr. 639.)

Accountant Wilson also was called as a government witness obviously to establish that Marzec had lied to his accountant and testified that in the latter part of 1950 he was employed by Marzec upon the recommendation of Richardson, that he went out to Marzec's home, examined his books and records with his Income Tax Returns and they were substantially in accord first for the year 1949 and then later for the year 1950. That as to both years, he inquired of Marzec whether he had any additional income and Marzec stated he did not. That around February of 1951 Marzec received a Form 1099 filed by Broker Banach, representing commissions to Marzec in the amount of $39,820 during the year 1950 (G. Ex. 30, Tr. 257); that Marzec denied receipt of this money and thereupon Wilson wrote a letter to Banach denying its receipt. (G. Ex. No. 31 dated Feb. 24, 1951, Tr. 259.) Four days later he received a letter from Banach's accountant (G. Ex. 32, Tr. 260) to the effect that Banach had practically absolute proof that Marzec had received these com-

missions; that he thereafter, on Marzec's behalf, filed an Amended Return for Marzec wherein Marzec picked up the additional income of $39,820 shown on Banach's Form 1099 even though he had distributed most of it to the others (Tr. 383) (G. Ex. 3, Amended Return filed June 29, 1951) and that he examined Banach's records before filing this return. (Tr. 264.) Wilson further testified that Marzec denied receipt of this money from Banach, both before the filing of G. Ex. 3, and subsequent thereto. (Tr. 364.) Marzec testified that Wilson told him that they were trying to settle the case without disclosing how the division was made and that when the case was settled this amended return would probably show overpayments or over reporting on his taxes. (Tr. 652.) The trial court refused to permit Marzec to show this latter situation. (Tr. 212-214, 231-233.)

On cross-examination Wilson admitted that in reply to his letter of February 24, 1951, to Banach denying the receipt of these commissions he had received a letter (G. Ex. 32) from Banach's accountant under date of February 28, 1951. This letter most certainly set forth most fully the true situation. (A. 127.) Wilson hedged when he was asked whether he had ever got a more straight, forthright, clear-cut letter from any firm of Certified Accountants as to the true situation. (Tr. 275.) He then testified within the next two weeks he went over and examined Banach's books. (Tr. 276.) Now certainly, at this time, accepting Wilson's version of the situation, Wilson knew that Marzec had received these Banach commissions; that Marzec's books did not reflect the Banach commissions and that since his Returns corresponded with the book, his Returns were false. Yet, thereafter, on April 12, 1951, he, together with Marzec, appeared at a conference at the Intelligence Unit, at which conference Marzec denied the receipt of the Banach money and Wilson undertook to sup-

port Marzec's position. (Tr. 282.) (D. Ex. 15; G. A. 473-476.) Such facts furnish strong corroboration of Marzec's version that both Wilson and Richardson, with knowledge of the true facts, advised him before this conference that it would be for the best interests of everyone and the case would be settled if he denied the receipt of any of these cash commissions. (Tr. 655-56.) Wilson on cross-examination admitted that Richardson, Marzec and himself might have discussed the fact that since cash was involved it would be hard to prove. (Tr. 293.)

Prior to this conference of April 12, 1951 the Agents had practically completed their "investigation". They then knew as did Wilson that Marzec's representation that he had reported his true income was false, yet no attempt was made to confront Marzec with the evidence they had uncovered. Had they confronted Marzec with the true facts of their then investigation, this whole picture would have come out. Osheroff, on cross-examination, admitted that at this conference on April 12, 1951, he was fairly certain that Marzec was lying as to Banach, and probably as to Miller. (Tr. 404.) He claimed that they were trying to get information from Marzec as to whether or not he would admit to a business deal with Banach. If this were true, and they were really wanting him to admit it, why didn't they ask him specific questions and confront him with the Banach checks at that time? They admittedly had about 75 of such checks then in their possession. Osheroff was so asked and he replied, "Was it our duty to present that?" (Tr. 405.) Osheroff then admitted that he knew that Marzec was sharing at least part of these commissions. He was then asked why Marzec wasn't asked with whom he was sharing these commissions, and Osheroff answered, "At that time he did not admit receiving commissions so how can you ask him how he shared them?" (Tr. 406.) Considering what transpired at this conference, it

would appear that this conference was designed primarily to get Marzec in and have him lie as to the receipt of the Banach commissions, and have him falsely state that he had no other unreported income. All to put Marzec in the worst possible light and to simultaneously refrain from asking him any specific questions which might bring out the true situation.

This formal conference was followed by another formal conference in the Regional Counsel's Office on Sept. 12, 1952. (D. Ex. 33, G. A. 477-502.) This was the final process of the Bureau. The Regional Counsel either forwarded the case to Justice for prosecution or sent the case back for civil settlement. Here Marzec had the benefit of both Wilson and Richardson. Marzec testified that prior to this meeting Richardson advised him that under no circumstances was he to answer any questions as to monies. (Tr. 659.)

Marzec was interrogated generally by Richardson just about nothing. Then Richardson interrogated Wilson. He talked about his preparing a net worth statement reflecting "little" unreported income, which he did not do at all, in that he had no work sheets for any work he did for Marzec. (Tr. 270.) He represented that he and Richardson checked Miller's books with his auditor item for item. (G. A. 487.) If they did they were misrepresenting. Miller was paying part of these commissions to Marzec by checks payable in cash. Marzec again denied receiving any commissions other than reported and he was then confronted with certain most incriminating evidence in the possession of the government. Richardson then took over and made it appear that he and Wilson had been deceived by Marzec, all ending up with his, Richardson's, statement to the effect that if Marzec had received these checks he was hooked and on his way to the penitentiary. (Tr. 658-59.) Presuming that Wilson and Richardson were as ignorant

of the true situation as they professed to be at the end of this conference, they then certainly learned the true situation. Why didn't they then ask for a delay, so they could get the detailed facts from "their" client, properly advise him and adequately protect his interests? And the only way to do that was for Marzec to tell the truth.

The trial judge refused to permit Marzec to testify as to the conversation he had with Miller immediately after this meeting about what transpired at the meeting. (Tr. 660.) Marzec then talked to Brandt about this meeting telling him that "Our attorney is not telling the truth," he has everything twisted and that there was "something wrong here." Brandt told him that everything would straighten itself out saying, "If you keep quiet this thing will come to a head and we will get our bill to pay." (Tr. 660.)[4] Marzec testified he heard nothing further from either Richardson or Wilson after this conference on September 12, 1952. (Tr. 661.)

On re-cross-examination Wilson produced a letter from his brief case from the Regional Counsel's Office dated September 28, 1952, addressed to Wilson advising him that Marzec's case had been forwarded to the Department of Justice, together with the envelope in which it came. (D. Exs. 16 and 16(a).) He admitted that he had no copy of a letter to Mr. Marzec advising him of the action taken. On re-direct he said he was almost certain that he had notified Marzec and Richardson, yet on re-cross he was unable to tell what he did physically or mentally on Marzec's behalf subsequent to September 12, 1952. Marzec's testimony was to the effect that after the conference of September 12, 1952, he never again heard of or saw either Richardson or Wilson. (Tr. 661.) The trial court refused

4. At the time of sentence the United States attorney and Brandt's attorney were agreed that Brandt had been outside the court room at all times and ready, willing and able to testify for the government.

to permit Marzec to show that he did not discover that his case had been cleared for prosecution until a year later when he was advised by Miller that it was in the office of the United States Attorney, that these others had furnished the Agents with affidavits, that they had not shared in these cash commissions and that during all this intervening period Miller had repeatedly advised him, Marzec, that his case was about to be settled (Tr. 662, Tr. 674, Offer of Proof) on the grounds that it was immaterial to any issues in the case. (Tr. 662.)

In Marzec's verified Motion to Vacate the Order of Jan. 23, 1957, for continuance and other relief, he alleged that it was the best of his recollection he was never asked by the Investigating Agents if he had shared these commissions with anyone else. The government answered this petition but did not deny this allegation. By the time the trial arrived both Wolfe and Osheroff testified that they had a conference with Marzec and Wilson on September 20, 1951; that Wolfe started questioning Marzec if he had failed to report any income in the line of commissions received and Marzec said, "I have nothing to say," and that then Wolfe asked Marzec if he got any commissions which he divided with the officers of the Union, and Marzec again stated that "I do not wish to say," or "to talk." That Wolfe then advised Wilson that "your client doesn't wish to talk" and Wilson said, "He doesn't talk to me. He doesn't wish to talk to me much." (Wolfe Tr. 432.) Osheroff's version of this conversation was substantially the same. (Tr. 396.) These Agents had no memoranda or diary entries covering the alleged conference. (Tr. 406-7.) Though Wilson was called as a government witness he was not asked concerning this alleged conversation. Marzec denied any such conference. (Tr. 746-747.) He said there were but two, the one in the special agents' office on April 12, 1951, and the one in the Regional Counsel's office on

September 12, 1952 and the government had conference memorandums on both! (D. Ex's. 15 and 33.)

Accepting the government's version as true, namely that such a conference did take place, Marzec's refusal to talk was, of itself, strong corroboration of the fact that he was sharing these commissions with these others, as these agents knew, and that they were requiring him to keep quiet. Additional investigation was required. And, for all practical purposes, they made none! They didn't even interview Kusper's secretary. (D. Ex. 22.) Special Agent Wolfe testified that after this alleged conference (where Marzec was supposed to have refused to talk when Wolfe asked him if he was sharing these commissions with these others) he sent Marzec a registered letter (G. Ex. 36, 37) and Wilson advised him that he could not get Marzec to come in. Our Revenue Statutes give Revenue Agents the right of subpoena.

What conversations did these Agents have with Wilson and Richardson outside of the presence of Marzec and what was their substance?

(a) Osheroff testified that he and Wolfe went out to Wilson's office on Sept. 28, 1951, to examine Marzec's books for 1950, and, at that time, Wilson told him that Marzec would not tell him anything and if he, Wilson, could withdraw gracefully from the case, he would do so. (Tr. 412.) Why didn't he withdraw? Wolfe's version of this conversation was a bit different. He testified that he never, at any time, had occasion to examine Marzec's books in that Osheroff had done that before he came to Wolfe. (Tr. 437.) That Osheroff, Wilson and he had a conversation on Sept. 28, 1951, at which time Wilson advised them that he had difficulty in getting information from Marzec and that he did not know whether anybody in the Union shared in the collections made by Marzec. This latter representation of Wilson was false in that the returns of Marzec, which he admittedly examined, showed oth-

erwise, namely, that Repsuk and Sobieraj were sharing and Wolfe knew it was false because he had the identical information. Why did Wolfe and Osheroff fail to call Wilson on his false representations. Wolfe also testified that Wilson further stated that he would just as soon get out of the case. (Tr. 441.) Probably what happened on Sept. 28, 1951, was that Wolfe and Osheroff went out to Wilson's office to get from Wilson certain of the Repsuk checks, Kusper spelled backwards, and the Sobieraj checks, all as shown from the Osheroff receipt to Wilson (D. Ex. 26, G. A. 345) which the Court refused to admit in evidence. (A. 222.) Wolfe admitted that at this conference when Wilson stated that he did not know whether anyone shared in these commissions that he, Wolfe, did not point out to Wilson that somebody did share in these commissions as shown on Marzec's returns. (Tr. 442.) Yet in the next breath, he said they wanted to get at the basis of the case, and that naturally the thought had occurred to him, a special agent of twenty years' experience that an employee in an inferior position must have had to share in any money he collected. (Tr. 442-4[illegible]. Why didn't they investigate?

(b) Wolfe testified that on Oct. 28, 195[illegible]lson and Richardson came to his office and said [illegible]they wanted to talk settlement and the proposition [illegible]ade by them "that they would settle for Marze[illegible] Joe Marzec would settle the full civil damag[illegible]s full civil income tax liability as set out by Osh[illegible]ff, and within five or six months." (Tr. 444.) T[illegible] record is silent as to who authorized them to make [illegible]ny such offer and who was to furnish the money. Certainly Marzec was not to do so. Who were Richardson and Wilson then talking for?

(c) Richardson also had a conference with Osheroff. Osheroff was anything but clear about this situation other than that it seemingly took place in Richardson's office. What was Osheroff doing over in Richardson's office? Osheroff says that he told Richardson that he wouldn't get anywhere dealing with him because it was more or less out of his, Osheroff's hands. (Tr. 412-13.)

(d) Wolfe also had a conference with Richardson. He testified that he had a slight conversation over at Max Miller's office when he was there trying to straighten out some of the evidence, and someone said, and he believed it was Richardson, that they were going to try to go up high to settle the case. (Tr. 447-481.) What business did Wolfe, the special agent, have talking about Marzec's case with broker Max Miller?

As would appear from all of the above conversations, Wilson and Richardson never, at any of these conferences, said one good or kind word on Marzec's behalf, or gave any facts to the agents which might be beneficial to Marzec. It is equally apparent from these same facts that Wilson and Richardson made no real effort whatsoever to attempt to settle this case, even though Brandt, Sobieraj, Miller, Richardson and Wilson were all telling Marzec to keep quiet, deny the receipt of these commissions and they would settle this case. Just look what Wilson did for Marzec on the Banach matter: (1) He wrote a letter to Banach, and a copy thereof to the Bureau, denying the receipt of any of these commissions; (2) He then with full knowledge that Marzec had received them, took Marzec into the Special Agent's office and has him deny the receipt of them and confirmed Marzec's representations; and (3) He then prepared an amended return for Marzec having him pick up all these Banach commissions even though he was liable for only his retained share. Wilson really "boxed Marzec in."

Now as to the non-sharing affidavits of Brandt, Kusper and Sobieraj which Special Agent Wolfe procured in the month of October, 1951. Sobieraj testified on behalf of the government, and it appeared that he furnished Agent Wolfe on Oct. 16, 1951, with an affidavit to the effect that his income tax returns were true and that he had received no other commissions than as shown by his returns. In other words, that he had not shared in these

cash commissions. (D. Ex. 17.) He testified that he was called down to Wolfe's office, interrogated before a stenographer by Wolfe, and she went out and about a half-hour later came back with the affidavit, and positively testified that Wolfe remained with him and that Wolfe did not dictate this affidavit. (Tr. 318-19.) Thus, we have the unbelievable story that this stenographer prepared this affidavit. Osheroff's story about these affidavits was even worse. He testified that Sobieraj, Brandt and Kusper gave statements to the Special Agents. (Tr. 418.) When asked whether he was there when these statements were taken or whether he was familiar with them, he stated, "I am familiar with them." (Tr. 418.) But Osheroff had been in contact with Sobieraj. He was asked whether he had conducted a simultaneous investigation of Sobieraj and he stated, "We had Sobieraj in, the situation being that nobody was telling anything." (Tr. 419.) And no one was investigating anything! The Trial Judge refused to permit defendant's counsel, on cross-examination, to even ask Agent Wolfe the circumstances under which he procured this affidavit from Sobieraj and similar affidavits from Brandt and Kusper. (Tr. 462, offer of proof, Tr. 463.) Why were these three non-sharing affidavits obtained from the very three persons who were actually receiving most of these commissions, and made a part of the file of Marzec's case?

Broker Miller's relationship with Special Agent Wolfe was also a bit questionable. As stated, Wilson, on Sept. 28, 1951, delivered to Osheroff and Wolfe certain Respuk checks and Sobieraj checks. Part of them were apparently returned as shown on the receipt. The others remained in Wolfe's possession. When Marzec's attorneys were attempting to get information to give the government they sought the return of these checks, and the balance of the checks from Wolfe, but were not successful. Marzec then contacted broker Miller and broker Miller was able

to arrange with Special Agent Wolfe to turn over those checks to Marzec's attorney. (Miller Tr. 189, Offer of Proof, Tr. 628-9.) Wolfe delivered these checks to Marzec's attorneys on September 16, 1954, and took a receipt for same. (Tr. 465, D. Ex. 21.) The Court refused to permit this receipt and these checks into evidence. (Tr. 805, 807.) Marzec's attorneys, seeking to gather evidence to give the United States Attorney, could not get Marzec's checks back from Agent Wolfe. Instead Marzec had to contact Miller and have Miller arrange with Wolfe for their return.

Osheroff, after 3 years of employment in the Bureau, left the Service in October of 1951, and immediately entered the employment of Arthur Goldberg, a CPA and in turn went to work for Miller. (Tr. 373.) He denied that Goldberg was then Miller's accountant stating, "I don't believe he was his accountant at that time, he became his accountant subsequently, I believe." And he also denied that he immediately went to work on Miller's records. (Tr. 417.) Miller testified that Goldberg had been his accountant for years. That Osheroff was Goldberg's employee who did work in Miller's office but he, Miller, dealt with Goldberg. (Tr. 192-194.)

In his long statements given to the United States Attorney on November 8, 1954 (D. Ex's. 19 and 20), Marzec set forth and advised him concerning the ownership (by way of a Land Trust) of a certain twelve-flat building located at 2729-37 West Leland Avenue, Chicago, Illinois; that in the spring of 1951, Richardson had sought a loan on said building purportedly for himself; that broker Miller had shortly thereafter taken over the negotiations and completion of said loan; that Osheroff, shortly after he left the Service, began making payments on said loan; and that when Marzec asked Miller about this latter fact, Miller stated that Osheroff's mother, had some money, and

he bought it for her (D. Ex. 20, p. 84). It was unfortunate that the United States Attorney failed to fully investigate the facts given to him pertaining to this situation. If he did investigate them, it was culpable that he did not produce them at the trial since this building may well have been the "pay-off", much like the $10,000 in the *Shotwell Manufacturing Company* case.

At the trial of Marzec, Miller testified that Richardson had nothing to do with this loan (Tr. 193); that Miller had acquired it and he made the mortgage himself with the union; that he held the building for about two or three years while Osheroff worked for Goldberg (and in turn for Miller); and that Osheroff came to him, said he had a little money, that he would like to buy a piece of property, and he sold the property to Osheroff, who took over the beneficial certificate on the trust and made the payments. (Tr. 196.) Osheroff's version was a bit different. He testified that the property was listed for sale in the Chicago Tribune in December of 1951, after he had left the government (Tr. 422); that he saw an advertisement in the paper regarding the piece of property, and it turned out to be Mr. Miller selling a piece of property; that a mortgage for $34,000 was placed on it on June 12, 1951; and that he, Osheroff, had bought the property in January of 1952. (Tr. 415, 416.)

The United States Attorney had all this information from Novemebr 8, 1954. It would seem that in fairness to Mr. Marzec that he should have most fully investigated this matter, and of his own volition fully brought out the true facts as to this entire suspicious transaction instead of permitting his own witness to give conflicting versions of same. This building might well have been the payoff.

APPENDIX C.

The "Corrupt Record."

Sobieraj's Testimony.

Before Sobieraj testified against Marzec, the government and its representatives, the United States Attorney and Worcester, knew (1) that Sobieraj had furnished the investigating agents with a false affidavit that he had reported all his income and had not shared in these cash commissions; (2) that he had testified falsely before the Grand Jury to like effect; (3) that he was not turning into a partnership he had with his mother-in-law all the commissions he received since agents had compared his individual returns with those of the partnership and when he undertook to so testify before the Grand Jury, they had called this fact to his attention (D. Ex. 18); and (4) that he had received certain commission checks aggregating approximately $2,500.00 (D. Ex. 27-31) from Marzec payable to both himself and the parnership which never reached the partnership and were not reflected in the supposed partnership record (G. Ex. 33) through an examination of Marzec's returns, his checks, and the supposed partnership record, all as reflected by the testimony of Worcester, and particularly his voluminous computations (G. Ex. 33, 33A-B, G. A. 346, 352, 395). These computations could not have been prepared after Sobieraj testified since he and Worcester testified the same day (G. A. 224).

In addition, at the time he appeared before the Grand Jury, Sobieraj produced and made available to the Government (G. A. 232) a little black book (G. Ex. 33), the entries of which reflected the receipt of some commissions from Marzec, cash and checks. It gave this book no credence as

reflected by the indictment which charges Sobieraj with the receipt of far greater commissions from Marzec than shown in said book. The reasons it gave this book no credence most probably were because its entries showed only the commissions Sobieraj was sharing with his mother-in-law, the distribution between themselves, and the receipt of her share, and reflected that it was her book, rather than the book of Sobieraj or that of the partnership (G. A. 315, 317, A. 269-270).

With all this knowledge and information and with full knowledge of Sobieraj's propensity towards prevarication, the United States Attorney called Sobieraj as a witness against Marzec, permitted him to and had him repeatedly testify that *all* the commissions he received from Marzec, checks and cash, were turned into the partnership and were reflected in said little black book (G. Ex. 33) which was the partnership record kept by his mother-in-law in the regular course of business (G. A. 212, 213, 215, 245)!

Much of Sobieraj's testimony before the Grand Jury was directly contrary to that he gave at the trial. Both places he asserted that there was no agreement between the parties as to the distribution of these commissions in that while he asked for a share of them, he accepted whatever Marzec gave him. Before the Grand Jury, he admitted only the receipt of the commission checks he had received from Marzec, and asserted that they were reported by him in his tax returns, and that he had reported his true income, thus denying the receipt of any of these cash commissions. At the trial he admitted the receipt of checks and cash from Marzec (G. A. 212). Before the Grand Jury he testified that he had never discussed these commissions with Brandt, and never offered to help Marzec. At Marzec's trial, he testified that after this investigation commenced, he and Brandt agreed that Marzec could keep all of the future commissions, and Marzec kept them (G. A.

243). This investigation commenced late in 1950 and extended through part of 1952. Special Agent Wolfe, on March 5, 1952, procured an affidavit from Broker Miller to the effect that he had dealt only with Marzec (D. Ex. 11, A. 223).

The court excluded Marzec's offered evidence that after the investigation had commenced, Sobieraj, in 1952, was in a position to demand and did demand one-half of the commissions Marzec collected, and Marzec distributed said one-half to Sobieraj by way of checks which Marzec then had in his possession. The trial court excluded this evidence on the theory that it was immaterial and had no probative value (G. A. 349-350). It only proved that Sobieraj's testimony given at the trial of Marzec that there was no agreement as to the division of the commissions was false, and likewise proved that his given testimony that Marzec had kept these commissions was false. The trial court also excluded Sobieraj's Grand Jury testimony (D. Ex. 18) on the theory that it was not impeaching and nothing was shown as to the falsity or inconsistency of his testimony before the Grand Jury and at the trial (A. 223). The trial court kept most everything beneficial to Marzec and his side of the case from the jury.

Worcester's Testimony.

The Government procured this indictment against Kusper charging him with the receipt of part of these cash commissions and in specific amounts for each of said years. This action on its part indicates that it then recognized and knew that Kusper had furnished the investigating agents with a false affidavit that he had not shared in these cash commissions and had falsely testified to like effect before the Grand Jury (G. A. 6, 19, 39). The indictment so procured of itself presupposed that the Government had substantial, or at least some, evidence that Kusper had shared in these cash commissions.

One of the witnesses the Government had before the Grand Jury against Kusper was Kusper's former secretary whom the investigating agents had never interrogated. Petitioner and his counsel procured from her a lengthy statement (D. Ex. 22) incriminating Kusper and delivered it to the Government in February of 1955, and it was used as a basis for her Grand Jury testimony (A. 227). On October 19, 1955, Worcester had procured an additional affidavit from her incriminating Kusper (D. Ex. 51). The trial court kept this evidence out (A. 227). The Government in its subsequent pleadings and in open court affirmed that Kusper had shared in these cash commissions and that it had evidence to that effect, even aside from the testimony of Marzec (G. A. 31).

The United States Attorney and Worcester knew that Kusper was sharing in these commissions and under suspicious circumstances through the Repsuk (Kusper spelled backwards) checks; they knew that Kusper was involved in the receipt of these cash commissions through the testimony of one of their own witnesses, Broker Milton, who testified that when he first sought a loan at the Union he was required to put the commission up in escrow with Kusper by way of a cashier's check endorsed by his attorney (A. 100-102, 105-107) and they knew from attorney Mroz, Kusper's assistant, whom they interviewed, that Kusper was concealing the pay-offs to himself by checks to his wife in her maiden name. The trial court kept this evidence out (A. 190-196, 194). The Government admitted that they knew other payments were made to Kusper in the name of his brother-in-law (A. 195). It even knew that Sobieraj was splitting commissions with Kusper. Sobieraj denied this fact on cross-examination (G. A. 226) and the Government established otherwise on redirect (G. A. 242). On January 23, 1957, the Government advised the trial court that he had obtained "new and ad-

ditional evidence'' against Kusper (A. 21). On November 19, 1957, it admitted in the court below, during the oral argument, that such new and additional evidence consisted ''only'' of evidence that Kusper had received cash commissions from others of approximately $2,000.00 which he had not reported.

With all this knowledge, his own acts and admissions, the United States Attorney on February 7, 1957, called Worcester as a witness against Marzec and permitted him to and had him testify to substantial effect that he could not find, and the Government had no evidence, that Kusper had shared in these cash commissions (G. A. 302, 303, 304, 305)!

The United States Attorney did not believe Worcester's testimony. On February 13, 1957, in his argument to the jury he stated: ''I think the evidence is quite clear that whenever possible Mr. Marzec obtained cash from brokers and that he distributed some of that unquestionably to these other three''. (Original transcript of record, Court of Appeals, 954). On February 18, 1957, the Government dismissed the indictment against Kusper for ''lack of sufficient evidence'' (A. 297).